FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 29 1953
CLERK

No. 307

In the Supreme Court of the United States

OCTOBER TERM, 1953

THE BARBOUR MACHINE TOOL COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
LEE A. JACKSON,
HARRY MARSELLA,
Attorneys,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 607

THE BRADFORD MACHINE TOOL COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 85a–87a) is not reported. The opinion of the court of appeals (Pet. 24–25) is reported at 260 F. 2d 950.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1958. The petition for a writ of certiorari was filed on December 29, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Tax Court's denial of relief under § 722 of the Internal Revenue Code of 1939 may—notwithstanding the provision of § 732(c) that the Tax Court's determination of any question "necessary

solely by reason of * * * section 722 * * * shall not be reviewed or redetermined by any court"—be reviewed with respect to the taxpayer's contention that the previous administrative allowance of some relief under § 722 for prior taxable years precluded the Commissioner from making a new determination and disallowing relief as to subsequent taxable years.

STATUTE INVOLVED

Section 732(c) of the Internal Revenue Code of 1939 (as added, 55 Stat. 17, and amended, 26 U.S.C. (1952 ed.) 732(c)) provides:

> (c) *Finality of Determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1)(H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court.

STATEMENT

For its excess profits tax years 1940 and 1941, the taxpayer was administratively granted some relief under § 722 of the Internal Revenue Code of 1939 upon the allowance of a "constructive average base period net income" to be used in determining its "excess profits credit" for those years.[1] The Commissioner subsequently disallowed identical claims for relief for the taxable years 1942–1945. On petition

[1] The nature of the relief authorized by § 722 is summarized in the Memorandum for the Respondent (pp. 6–8) filed in *Brown Paper Mill Co.* v. *Commissioner*, No. 351, this Term.

to the Tax Court, taxpayer contended that the previous administrative determination of a "constructive average base period net income" was binding on the Commissioner and that the Commissioner could not make a new determination as to the right to relief for later years. The Tax Court rejected that contention and, since taxpayer introduced no evidence in support of its claims for relief for 1942–1945, denied relief (R. 85a–87a). The court of appeals dismissed the petition for review on the ground that appellate review of the Tax Court's decision was barred by § 732(c) (Pet. 24–25).

DISCUSSION

Since the sole issue in this case was the taxpayer's right to relief under § 722,[2] the determination of the "estoppel" question was made "necessary solely by reason of section * * * 722" and review of the question on appeal was clearly precluded by § 732(c).[3]

[2] Petitioner's claims that other issues are involved are frivolous. There would be no unused excess profits credit for 1944 to be carried back to 1942 and 1943 under § 710(c)(3)(A) unless § 722 relief were first granted for 1944. That the statute of limitations in § 275 bars any further assessments for 1941 is true but irrelevant; the only years involved here are 1942–1945. The claim to an increased amortization deduction under § 124, which has nothing to do with the relief issue, was raised neither in the Tax Court nor in the court of appeals.

[3] While we do not believe that the merits of the estoppel contention are relevant to the question before the Court, it may be noted that petitioner's reliance on § 722(d) and the regulations thereunder is misplaced. The provisions relied on are purely procedural. Normally a taxpayer claiming a right to relief under § 722 is required to file a return, and pay the tax, without regard to his claim for relief and then file an application for relief by way of a claim for refund. See § 722(d). However, when use of a constructive average base period net income has

There is no conflict with the decision of the Second Circuit in *George Kemp Real Estate Co.* v. *Commissioner*, 205 F. 2d 236, certiorari denied, 346 U.S. 876. There the Tax Court, in a proceeding involving one excess profits tax year, held that the taxpayer's income during the base period had not been depressed by factors which, under § 722, would permit a "constructive" average base period net income to be used in determining the excess profits credit. In a second proceeding before the Tax Court involving claims for relief upon the same ground for subsequent years, the Tax Court held that the issue of the normalcy of the taxpayer's base period income was controlled by the prior decision under principles of collateral estoppel and could not be relitigated. The court of appeals held that it could review the application of res judicata, and affirmed the decision of the Tax Court. In this case, the contention is not one of res judicata but one of the binding effect of a prior unlitigated administrative grant of relief for different taxable years. Moreover, the effect of the Tax Court's decision in the *Kemp* case was to deny the taxpayer any hearing on his right to relief for the years there involved—an effect similar to that of a denial by the Tax Court of

---

been allowed for one year, the taxpayer is permitted, as provided in the regulations, to assert his claim for similar relief on his returns thereafter filed for subsequent years, and the returns themselves are then treated as applications for relief. See Treas. Regs. 112, § 35.722-5(d), as amended by T.D. 5393, 1944 Cum. Bull. 415. In short, the last sentence of § 722(d) simply relieves the taxpayer, in the stated circumstances, of the requirement that he pay the full tax before seeking relief. It has nothing to do with the substantive effect of the prior determination.

its own jurisdiction—whereas here the taxpayer was afforded an opportunity to establish its right to relief but failed to do so.

As shown by the Memoranda for the Respondent filed in *Brown Paper Mill Co.* v. *Commissioner*, No. 351, this Term, certiorari denied, December 8, 1958, and *Crowell-Collier Pub. Co.* v. *Commissioner*, No. 500, this Term, certiorari denied, January 12, 1959, the Commissioner believes there is a need for definitive clarification of the scope and effect of § 732(c), especially in view of the underlying inconsistency between the rationale of the opinion below and that of the Ninth Circuit in *Helms Bakeries* v. *Commissioner*, 236 F. 2d 3. It is recognized, however, that the reasons for granting the writ in this case are no more compelling than those urged in the earlier cases, except as this additional case serves to emphasize the broad scope of the underlying problem.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
HARRY MARSELLI,
Attorneys.

JANUARY 1959.

U. S. GOVERNMENT PRINTING OFFICE: 1959